

**ITT Lighting Fixtures, Division of ITT Corporation and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW and Jo Ann Gray.** Cases 26-CA-8007, 26-CA-8029, 26-CA-8581-2, and 26-CA-7710

April 22, 1981

### ORDER DENYING MOTION

On September 30, 1980, the Acting Regional Director for Region 26 of the National Labor Relations Board issued an "Order Consolidating Cases, Amendment to Amended Consolidated Complaint and Notice of Hearing" in the above-entitled four cases alleging that Respondent violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act, as amended.

The amended charge in Case 26-CA-7710 alleged, *inter alia*, that the transfer of Winnie Williams was violative of the Act. However, Williams' transfer was not included in the amended consolidated complaint which issued on August 10, 1979, in Cases 26-CA-7710, 26-CA-7781, and 26-CA-7792. These cases, 26-CA-7710, 26-CA-7781, and 26-CA-7792, were heard before an Administrative Law Judge on October 9-11, 1979.<sup>1</sup> Respondent filed exceptions to the Administrative Law Judge's Decision. The cases are currently before the Board for decision.

On September 7, 1979, the charge was filed in Case 26-CA-8029 alleging, *inter alia*, that employee Winnie Williams was discriminatorily transferred to a more onerous position due to her union membership and because she testified at the hearing in Case 26-CA-7710. This charge was amended on October 16, 1979, but all allegations relating to Williams were deleted from the amended charge. On October 19, 1979, the Regional Office issued an amended consolidated complaint (consolidating the charges in Cases 26-CA-8029 and 26-CA-8007).<sup>2</sup> The consolidated complaint similarly did not contain any allegations pertaining to Winnie Williams.

Thereafter on August 11, 1980, the charge was filed in Case 26-CA-8581-2, alleging that Respondent violated Section 8(a)(1), (3), and (4) of the Act by denying Winnie Williams a promotion in July 1980 because of her union activities and be-

cause she filed charges under the Act. After investigation of this charge the Acting Regional Director issued the amendment to the amended consolidated complaint in dispute herein, which contains not only the allegations in Case 26-CA-8581-2, but also the allegations concerning Winnie Williams set out in the charges filed in Cases 26-CA-7710 and 26-CA-8029.

Respondent moved for partial summary judgment on October 9, 1980, requesting that the Board dismiss paragraphs 10(a), (b), and (c)<sup>3</sup> of the amendment to the consolidated complaint in the instant cases on the ground that the Section 10(b) 6-month period of limitations prohibited the Acting Regional Director from amending the complaint to encompass the allegations in those paragraphs. Respondent also contends that neither the Acting Regional Director nor the General Counsel had jurisdiction over Case 26-CA-7710, inasmuch as that case was transferred to the Board on December 28, 1979. Hence, Respondent argues that the Acting Regional Director lacked authority to consolidate Case 26-CA-7710 with the other charges in this matter.

On November 13, 1980, counsel for the General Counsel filed an opposition to Respondent's motion contending, *inter alia*, that Respondent's motion should be denied because it is a motion to dismiss which should properly be ruled upon by the administrative law judge assigned to hear the case. The General Counsel also contends that the allegation in the instant case with respect to Winnie Williams' job reassignment is based upon a charge which was filed within the 6-month period. Further, the General Counsel asserts that, although the allegations pertaining to Winnie Williams in Case 26-CA-8029 were deleted in the amended charge, the remainder of the allegations in the amended charge dealt with discriminatory transfers of other employees to more onerous jobs, the same allegation involving Winnie Williams. Hence, the General Counsel argues that the complaint may allege the violation concerning Winnie Williams inasmuch as it arises out of the same operative facts as allegations already included in the amended charge.

On December 1, 1980, Respondent filed a response to the General Counsel's opposition reiterating the arguments contained in its motion, and contending that the General Counsel's treatment of the allegations concerning Winnie Williams is an impermissible abuse of his discretion.

We have duly considered the matter, and are of the opinion that there are material issues to be re-

<sup>1</sup> At the hearing counsel for the General Counsel introduced evidence that Respondent violated Sec. 8(a)(1) of the Act with respect to certain conduct toward employee Winnie Williams. This conduct concerning Williams was unrelated to the allegation concerning this employee set forth in the amended charge in Case 26-CA-7710. The Administrative Law Judge found no violation based on this evidence and the incident to which it related.

<sup>2</sup> The charge in Case 26-CA-8007 alleged that Respondent violated Sec. 8(a)(1), (4), and (5) of the Act. Respondent moved for summary judgment in Cases 26-CA-8007 and 26-CA-8029. The Board on March 18, 1980, denied Respondent's motion.

<sup>3</sup> These paragraphs are based on the allegations relating specifically to Williams in the amended charge in Case 26-CA-7710 and the original charge in Case 26-CA-8029.

solved at a hearing conducted before an administrative law judge concerning paragraphs 10(a), (b), and (c) of the consolidated amended complaint in this proceeding.

It is hereby ordered that Respondent's Motion for Partial Summary Judgment be, and it hereby is, denied without prejudice to Respondent to renew its arguments before the Administrative Law Judge.

MEMBER ZIMMERMAN, dissenting:

I dissent from my colleagues' failure to grant Respondent's Motion for Partial Summary Judgment with respect to the allegations in the amended consolidated complaint based on the charges in Cases 26-CA-8029 and 26-CA-7710 relating to Winnie Williams.

At the heart of Respondent's motion is the question of whether the Board will permit the Acting Regional Director and the General Counsel to revive charges filed on behalf of employee Winnie Williams against Respondent which, whether through inadvertence or neglect, were omitted from the complaint in Case 26-CA-7710, and were also deleted in the amendment to the charge in Case 26-CA-8029. Fairness to this Respondent compels me to dissent from my colleagues' decision to permit this practice.

The amended charge in Case 26-CA-7710 was filed April 2, 1979. It alleged, *inter alia*, that Respondent discriminatorily transferred employee Winnie Williams on March 16, 1979. On August 10, 1979, an amended consolidated complaint issued in Case 26-CA-7710, but that complaint did not contain any allegations about Winnie Williams. The case was heard before an Administrative Law Judge who rendered a Decision on December 28, 1979. Respondent filed exceptions to that Decision and that case is currently pending before the Board.<sup>4</sup> Nine months later, on September 30, 1980, the Acting Regional Director for Region 26 revived the previously ignored allegations of the charge in Case 26-CA-7710 relating to Williams.

<sup>4</sup> It should be noted that at the hearing in that case the General Counsel attempted to introduce evidence of certain unlawful conduct concerning employee Winnie Williams. This conduct, however, was unrelated to the allegations discussed herein with respect to that employee. (The Administrative Law Judge specifically declined to find an unfair labor practice based on such evidence.) At no time before or during the hearing did the General Counsel attempt to amend the complaint to allege a violation with respect to Williams based on the allegation in the charge in Case 26-CA-7710 which he now seeks to litigate. Nor did he attempt to litigate before the Administrative Law Judge or even make mention of the issue raised by that allegation. However, the charge alleged such a violation and that allegation was never administratively dismissed or withdrawn. The General Counsel has offered no reason for the failure to dispose of this allegation until now, despite his full awareness of its existence. The Region presumably had investigated the allegation before issuing the complaint heard before the Administrative Law Judge in the earlier proceeding involving Case 26-CA-7710.

He did so by amending a complaint issued earlier on other charges concerning Williams to include the allegations left lying on the cutting room floor when the original complaint in Case 26-CA-7710 was issued.

I cannot sanction a procedure whereby a Regional Director can reach into the Board's backyard, and take back cases—or parts of them—at his discretion. The net effect of the Acting Regional Director's actions would be to deny finality to decisions of administrative law judges by reopening and relitigating moribund charges at any time.

The Board disapproved such procedural irregularity in *Union Electric Company*,<sup>5</sup> a case in which my colleagues in the majority—Chairman Fanning and Member Jenkins—both participated. *Union Electric* presented the Board with a situation in which the General Counsel issued a consolidated complaint based upon charges alleging violations of the Act which had been specifically alleged in a previous charge and dismissed by the Regional Director when he issued a complaint on other allegations in the charge. As here, a hearing was held and a Decision rendered by an Administrative Law Judge on the first case. The Board, adopting the Administrative Law Judge's reasoning, dismissed a later case involving allegations which the Regional Director could have—but did not—allege in the first case. The Administrative Law Judge in *Union Electric* relied upon *Peyton Packing Company, Inc.*,<sup>6</sup> and *Jefferson Chemical Company, Inc.*,<sup>7</sup> to sustain the dismissal. The Board's language in *Union Electric* is particularly applicable here:

[I]n dismissing a complaint in *Jefferson Chemical Company, Inc.* . . . the Board recently declared that the General Counsel "is duty bound to investigate all matters which are encompassed by the charge, and to proceed appropriately thereafter" and that, "We believe that such multiple litigation of issues which should have been presented in the initial proceeding constitutes a waste of resources and an abuse of our processes and that we should not permit it to occur."

Sound judicial administration thus does not permit of either relitigation or piece-meal [sic] litigation, and there are both in this proceeding. [219 NLRB at 1087.]

In addition, the doctrine of *res judicata* militates strongly against the piecemeal litigation of claims that the General Counsel has pursued in this case:

The interest of parties and of the public in ending litigation normally bars a party who

<sup>5</sup> 219 NLRB 1081 (1975).

<sup>6</sup> 129 NLRB 1358, 1360 (1961).

<sup>7</sup> 200 NLRB 992, fn. 3 (1972).

has had his day in court from further pressing the same claims or the same defenses. Under the principles of bar and merger a judgment for the defendant bars the plaintiff from again asserting the same claim and a judgment for the plaintiff prevents the plaintiff from trying to get more, the theory being that the cause of action has merged in the judgment. When a cause of action is merged in or barred by a judgment, the judgment is binding no matter what issues were or were not actually litigated; *it is binding even as to matters which might have been but were not actually litigated.*<sup>8</sup> [Emphasis supplied.]

The General Counsel has had a hearing upon the allegation in Case 26-CA-7710. He had Williams on the witness stand at that time and then had the opportunity to move to amend the complaint in that action to include the issue he now seeks to litigate.<sup>9</sup> He chose not to do so. He should not now be allowed to reconsider his position, and to determine in a subsequent action that he will litigate an issue that could have been heard in the prior case.

I am not unmindful that such a result would prevent the litigation of the allegation concerning Williams in the amended charge in Case 26-CA-7710. However, at the hearing before the Administrative Law Judge in Cases 26-CA-8581-2 and 26-CA-8007 the General Counsel would be given the opportunity to introduce evidence pertaining to that charge as background material, shedding light on the unfair labor practices properly alleged in the complaint concerning events which occurred after the events that were the subject of the amended charge in Case 26-CA-7710.<sup>10</sup>

<sup>8</sup> K. Davis, "Administrative Law Text" §18.01 at 359-360 (3d ed. 1972).

<sup>9</sup> National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, Sec. 102.17.

<sup>10</sup> Local Lodge No. 1424, International Association of Machinists, AFL-CIO, et al. [Bryan Manufacturing Co.] v. N.L.R.B., 362 U.S. 411 (1960).

Similarly, I would dismiss those allegations concerning Williams in the amendment to the amended consolidated complaint based upon the charge in Case 26-CA-8029. That charge was filed on September 7, 1979, and alleged, *inter alia*, that Respondent discriminatorily assigned Winnie Williams to more onerous jobs because of her union activities and because she testified at a Board hearing. However, this charge was specifically amended on October 16, 1979, and the amended charge excluded allegations with respect to Winnie Williams. A year later, the General Counsel revived the allegations that were specifically deleted.

The rationale discussed above for not reopening Case 26-CA-7710 also militates against allowing the Acting Regional Director to revive allegations concerning Williams contained in the original charge in Case 26-CA-8029. *California Pacific Signs, Inc.*,<sup>11</sup> cited by the General Counsel in his opposition to Respondent's motion, does not demand a different result inasmuch as that case is inapposite. That case dealt with whether Section 10(b) barred the General Counsel from reviving dismissed charges where there was newly discovered evidence. The General Counsel does not contend that any newly discovered or previously unavailable evidence exists in Case 26-CA-8029.<sup>12</sup>

For the foregoing reasons, I would grant Respondent's Motion for Partial Summary Judgment and strike paragraphs 10(a), (b), and (c) of the amendment to the amended consolidated complaint. Since my colleagues are content to permit the General Counsel to revive issues he long ago abandoned, I dissent.

<sup>11</sup> 233 NLRB 450 (1977).

<sup>12</sup> Cf. Rules and Regulations and Statements of Procedure, Series 8, as amended, Sec. 102.67 (f) (issues not litigated in representation proceeding not subject to litigation in subsequent, related unfair labor practice proceeding).